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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/065,326

10/03/2002

Steven Curtis Zicker

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EXAMINER

KIM, JENNIFER M

ART UNIT

PAPER NUMBER

1617

MAIL DATE

DELIVERY MODE

01/23/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/065,326	Applicant(s) ZICKER ET AL.	
	Examiner JENNIFER MYONG M. KIM	Art Unit 1617	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on October 14, 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-11 is/are pending in the application.
- 4a) Of the above claim(s) 8 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-7, 9-11 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicants' submission filed on October 14, 2008 has been entered.

Response to Arguments

Applicants' arguments filed October 14, 2008 have been fully considered but they are not persuasive. Applicants argue that that Reinhart would not have reasonably expected that the pet food product of Reinhart would have a positive effect on animal behavior, as Applicants have used that term in the claims. This is not found to be persuasive because that dietary deficiency and supplementation of omega-3 fatty acids have been associated with several effects on behavior is well known in view of Reisbick et al. It is well known in view of Reisbick et al. that DHA levels correlate simultaneously with both levels of dopamine and Dopamine2 receptors and certain behaviors. Therefore, one of ordinary skill in the art would reasonably expect that the pet food

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product comprising omega-3 fatty acids particularly, DHA would have a positive effect on animal behavior.

Applicants argue that Reinhart could not teach or suggest method of influencing behavior as recited by the instant claims based merely on Reinhart's teaching of reducing allergic and inflammatory conditions. This is not found to be persuasive because the teaching of Reinhart as modified by Reisbick et al. would influence the behavior of the animals because Reinhart teaches the product improved the general comfort and well-being of the animals by improving skin conditions while Reisbick et al. teach that the component of the product, DHA affects certain behaviors by affecting dopamine and dopamine 2 receptors. One of ordinary skill in the art would recognize that the animals that have consumed such product would have better or different behavior because the product improved the general comfort and well-being of the animals and because the product comprise the active agent DHA which have effect on certain behaviors as taught by Reisbick et al. There is a reasonable expectation of successfully influencing behavior of the dog by providing comfort food comprising DHA associated with several effects on behavior that actually improves general comfort and well-being of the animals. Thus, the claims fail to patentably distinguish over the state of the art as represented by the cited references.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-7 and 9-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reinhart (EP 0678247A1) in view of Reisbick et al.

Reinhart teaches a pet food product containing omega-6 and omega-3 fatty acids from 3:1 to 10:1 and wherein at least 3% of the total fatty acids in the composition are the omega-3 fatty acids and that omega-3 fatty acids can be eicosapentaenoic acid and docosahexaenoic acid. (page 6, claims 1 and 2, claim 6). The amount of omega-3 fatty acid taught by Reinhart is within the amount set forth in claim 11. Reinhart teaches the product improved the general comfort and well-being of the animals. (page 6, lines 16-24).

Reinhart does not expressly teach the influencing behavior in an animal.

Reisbick et al. teach that dietary deficiency and supplementation of omega-3 fatty acids have been associated with several effects on behavior. (page 419, summary). Reisbick et al. teach that a decrease in dopamine and/or dopamine receptors in the prefrontal cortex of deficient animals increase their responsivity to environmental stimuli. Reisbick et al. teach that DHA levels will correlate simultaneously with both levels of dopamine and Dopamine2 receptors and certain behaviors. (page 419).

It would have been obvious to one of ordinary skill in the art that animals treated with the pet food product of Reinhart would influence the behavior of the animals because Reinhart teaches that pet food product improved the general comfort and well-being of the animals and because Reisbick et al. that DHA affects certain behaviors and

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that dietary deficiency and supplementation of omega-3 fatty acids have been associated with several effects on behavior. Therefore, one of ordinary skill in the art would reasonably expect that the pet food product comprising omega-3 fatty acids particularly, DHA as active agent would have a positive effect on animal behavior in Reinhart as modified by Reisbick et al. One of ordinary skill in the art would recognize that the animals that have consumed such product would have better or different behavior because the product improved the general comfort and well-being of the animals and the product contains omega-e fatty acid particularly DHA that influence animal behavior as taught by Reisbick et al. There is a reasonable expectation of successfully influencing behavior of the dog by providing comfort food that contains DHA as an active agent which improves general comfort and well-being of the animals.

For these reasons the claimed subject matter is deemed to fail to patentably distinguish over the state of the art as represented by the cited references. The claims are therefore properly rejected under 35 U.S.C. 103.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140

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F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-5, 7 and 9-11 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-20 of copending Application No. 10/912,864. Although the conflicting claims are not identical, they are not patentably distinct from each other because the animal population (an animal) to be treated in the instant claims overlap and encompasses the specific population (a dog having osteoarthritis) of claims in the copending Application. Further, the instant claims and the claims in the copending Application involves same method step of administering same active agent. As such, the claimed method for influencing behavior in an animal would obviously achieved upon administration of the same active agent to the overlapping population involving same method step taught by the copending claims.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

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Claims 1-5, 7 and 9-11 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 7, 13, 19 and 26-29 of copending Application No. 11/057,718. Although the conflicting claims are not identical, they are not patentably distinct from each other because the animal population (an animal) to be treated in the instant claims overlap and encompasses the specific population (a dog having arthritis) of claims in the copending Application. Further, the instant claims and the claims in the copending Application involves same method step of administering same active agent. As such, the claimed method for influencing behavior in an animal would obviously achieved upon administration of the same active agent to the overlapping population involving same method step taught by the copending claims.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

None of the claims are allowed.

Communication

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JENNIFER M. KIM whose telephone number is (571)272-0628. The examiner can normally be reached on Monday through Friday 6:30 am to 3 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreenivasan Padmanabhan can be reached on 571-272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Jennifer Kim/
Primary Examiner, Art Unit 1617

Jmk
January 14, 2009